Supreme Court, U.S.
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No. 05-

IN THE

Supreme Court of the United States

MIDWEST GENERATION, EME, LLC,

Petitioner,

v.

LOCAL 15, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, and NATIONAL LABOR RELATIONS BOARD,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the National Labor Relations Board reasonably concluded that an employer's retention of "crossover" employees (*i.e.*, employees who abandon an economic strike) during an otherwise lawful lockout does not violate Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1) and 158(a)(3); *see also Trans World Airlines v. Indep. Fed'n of Flight Attendants*, 489 U.S. 426 (1989).

2. Whether the court of appeals erred in applying an "extreme business exigency" or "defensive" standard to the retention of crossover employees during a lockout where lesser standards apply to permanent striker replacements under *Belknap, Inc. v. Hale*, 436 U.S. 491 (1983), and to temporary lockout replacements under *Int'l Bhd. of Boilermakers, Local 88 v. NLRB*, 858 F.2d 756 (D.C. Cir. 1988) and *Harter Equip., Inc.*, 280 N.L.R.B. 597 (1986).

3. Whether the court of appeals exceeded its authority under Section 8(d) of the National Labor Relations Act by inviting the invalidation of an entire collective bargaining agreement. 29 U.S.C. § 158(d).

PARTIES TO THE PROCEEDINGS BELOW AND CORPORATE DISCLOSURE STATEMENT

The petitioner here, which was the intervenor in the court of appeals in support of the National Labor Relations Board's order, is Midwest Generation EME, LLC. Petitioner is wholly owned by Edison Mission Energy. Edison Mission Energy is wholly owned by Mission Energy Holding Company. Mission Energy Holding Company is wholly owned by The Mission Group. Petitioner is not related to any other publicly held or publicly traded companies under Supreme Court Rule 29.6. The respondents here are Local 15, International Brotherhood of Electrical Workers, AFL-CIO, which was the petitioner in the court of appeals, and the National Labor Relations Board, which was the respondent in the court of appeals.

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OPINIONS BELOW

The opinion of the court of appeals, App., *infra*, 1a-21a, is reported as *Local 15, Int'l Bhd. of Elec. Workers, AFL-CIO v. NLRB*, 429 F.3d 651 (7th Cir. 2005). The court of appeals' decision reversed a decision and order of the National Labor Relations Board, App., *infra*, 22a-46a, reported as *Midwest Generation EME, LLC*, 343 N.L.R.B. No. 12 (Sept. 30, 2004) (Table).

JURISDICTION

The judgment of the court of appeals was entered on October 31, 2005. App., *infra*, 1a-21a. The National Labor Relations Board's timely petition for rehearing was denied on January 4, 2006. On January 11, 2006, the court of appeals amended its January 4, 2006 order to include its denial of Midwest Generation EME, LLC's timely petition for rehearing. App., *infra*, 47a-48a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case arises under the National Labor Relations Act (the "NLRA" or the "Act"), 29 U.S.C. § 151, *et seq.* Specifically at issue are Sections 7, 8(a)(1), 8(a)(3), and 8(d) of the Act.

> Section 7 of the Act, 29 U.S.C. § 157, states in relevant part:
>
> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through

representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . . .

Section 8(a) of the Act, 29 U.S.C. § 158(a), states in relevant part:

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer –

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:

* * * *

Section 8(d) of the Act, 29 U.S.C. § 158(d), states in relevant part:

d) Obligation to bargain collectively

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and

> confer in good faith with respect to wages, hours, and other terms and conditions of employment, . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession:
>
> * * * *

STATEMENT

The principal issue presented by this case is whether the National Labor Relations Board ("the Board") reasonably concluded that an employer does not violate the Act by retaining crossover employees (*i.e.*, employees who abandon an ongoing economic strike) during a subsequent bargaining lockout. In the Board's view, the post-strike retention of crossovers does not invalidate an otherwise lawful lockout instituted for the purpose of exerting economic pressure in support of bargaining demands. The Board further held that it would be anomalous to allow an employer the right to retain temporary replacements during a lockout while, at the same time, forbidding the retention of crossover employees. The court of appeals disagreed and held that the retention of crossovers, absent extreme circumstances, interferes with the right to strike and illustrates an antiunion animus. This case also presents the question of whether the court of appeals exceeded its authority, under Section 8(d) of the Act, by inviting the invalidation of an entire collective bargaining agreement.

As this Court has recognized, "virtually every" labor dispute involves crossover employees who refrain from strike activity. *See Trans World Airlines, Inc. v. Indep. Fed'n of Flight Attendants*, 489 U.S. 426, 468 (1989). The writ of certiorari should be granted because the appropriate legal

standards for crossovers and lockouts are recurring issues that apply across industries nationwide.

A. The Facts

The facts are undisputed and set forth in a *Statement of Stipulated Facts*. Petitioner Midwest Generation EME, LLC ("the Company") and Local 15, International Brotherhood of Electrical Workers ("the Union") engaged in collective bargaining. The Company bargained in good faith throughout the entire course of negotiations. App., *infra*, 5a, 25a. Negotiations stalled nonetheless.

In response, on June 28, 2001, the Union commenced a strike involving approximately 1150 bargaining unit employees. App., *infra*, 2a, 25a. The work stoppage constituted an economic strike, as opposed to an unfair labor practice strike, at all times. The economic strike's stated purpose was to garner support for union bargaining positions and to pressure the Company to accede to Union demands.

At the strike's onset, the Company maintained operations through the use of non-bargaining unit personnel such as supervisors, contractors and temporary replacement employees. App., *infra*, 3a, 25a. The Company refrained from hiring permanent replacement employees, thereby preserving the reinstatement prospects of the strikers.

Eight (8) bargaining unit employees refused to join the strike from its inception and remained at work in the same positions they had held prior to the work stoppage. As the strike continued, fifty-three (53) other bargaining unit employees abandoned the Union's economic action. The Company accepted these employees back to their original positions without regard to their membership status in the Union, or any union. The Company did not grant "super-

seniority" or any other benefit to these employees either before or after the work stoppage.

Combined, these sixty-one (61) "crossover" employees elected to "refrain from" the protected activity of an economic strike. This decision constitutes its own form of protected activity under Section 7 of the Act. 29 U.S.C. § 157.

At the beginning of Labor Day weekend 2001, the Union extended an unconditional offer to return to work on behalf of the approximately 1100 employees who remained actively engaged in the economic strike. Despite this offer, the Union still refused to agree to the Company's lawful and legitimate contract demands. Therefore, collective bargaining remained unsettled at the time of the Union's offer.

The Company declined the Union's offer and instead instituted a lockout of striking employees. The stated and undisputed purpose of the lockout was to garner support for Company bargaining positions and to pressure the Union and striking employees to agree to Company demands.

The lockout brought closure to a protracted contract dispute. Ultimately, the Company and the Union agreed to a comprehensive collective bargaining agreement effective by its terms from October 22, 2001 to December 31, 2005. Beginning on October 22, 2001, all locked out employees were reinstated to their original pre-strike positions.

The foregoing is a recital of the proper interaction between good faith collective bargaining and the deployment of economic weapons to enforce contract demands. *See NLRB v. Ins. Agents Int'l Union, AFL-CIO*, 361 U.S. 477, 495 (1960) (Economic weapons are not a "grudging exception to some policy of completely academic discussion enjoined by the Act; [they are] part and parcel of the process of collective

bargaining."). Likewise, this Court long ago validated an employer's right to institute a lockout for the sole purpose of exerting economic pressure in support of lawful bargaining positions. *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 312 (1965).

B. Crossover Employees

The Company permitted crossover employees to remain at work during the lockout in the same positions they had reclaimed during the economic strike. App., *infra*, 4a, 26a. The Company notified the Union that crossovers would remain at work in the same letter that announced the decision to institute a lockout. App., *infra*, 3a, 26a. The Company's actions fully comported with Board guidance available at the time. *See Tidewater Const. Corp.*, 333 N.L.R.B. 1264, 1269 (2001) ("If the rationale underlying the allowance of a lockout is to put pressure on a union to accept the employer's bargaining demands, it would hardly serve that purpose to lock out [a crossover]. . . .").

C. Board Proceedings

In response to an unfair labor practice charge filed by the Union, the Board's General Counsel issued an unfair labor practice complaint based on a single allegation: namely, that the retention of crossovers during the lockout was "inherently destructive" of the right to strike.

The General Counsel, the Company and the Union subsequently submitted a *Statement of Stipulated Facts* and *Joint Motion to Transfer* this case directly to the Board pursuant to Section 102.50 of the Board's Rules and Regulations. Thereafter, all parties submitted briefs.

On September 30, 2005, the Board issued a Decision and Order dismissing the unfair labor practice complaint in its entirety. App., *infra*, 39a-40a. The Board based its decision on three principles that fully comport with this Court's express guidance.

First, in the context of economic warfare, an employer has a legitimate business interest in retaining employees and continuing operations. App., *infra*, 33a ("It is self-evident that the [Company's] retention of the crossover employees and nonstrikers during the lockout augmented its effort to maintain continued production."); *see also Belknap, Inc. v. Hale*, 463 U.S. 491, 504 (1983) (The motive for retaining replacement employees during economic warfare is immaterial, absent independent evidence of antiunion animus, because employees, by definition, aid the business enterprise.). This business interest is heightened when the employee in question is a member of the employer's regular workforce, as opposed to a newly-hired replacement. App., *infra*, 33a; *see also Trans World*, 489 U.S. at 437 (Crossover employees are "doubtless more experienced and therefore more needed" than newly-hired replacements.). In the Board's view, it would be anomalous to allow an employer the use of newly-hired temporary replacements during a lockout while forbidding the retention of crossovers. App., *infra*, 33a; *see also Int'l Bhd. of Boilermakers, Local 88 v. NLRB*, 858 F.2d 756, 768 (D.C. Cir. 1988) (use of temporary replacements during lockout does not violate the Act); *Harter Equip., Inc.*, 280 N.L.R.B. 597, 599 (1986) (same).

Second, the Board reasoned that a crossover who chooses to refrain from strike activity should not be placed in a worse position than he or she would have been had the strike not ended. App., *infra*, 33a (refusing to "visit on the crossover and nonstriking employee the consequences of the gamble taken by employees who elected to remain on strike");

see also Trans World, 489 U.S. at 438 (same). Crossovers abandoned an economic strike undertaken for the express purpose of enforcing Union bargaining demands, and instead offered to work behind a picket line. Therefore, the Board concluded that the Company's lockout reasonably drew a "lawful distinction between those employees who eschewed the strike weapon during the strike and those who stayed on strike until the end of the strike." App., *infra*, 36a n. 12.

Third, the Board stated that the use of a lockout is lawful absent evidence—independent from the lockout itself—of improper antiunion motivation. App., *infra*, 38a; *Am. Ship*, 380 U.S. at 312 (A lockout does not "fall into that category of cases arising out of [S]ection 8(a)(3) . . . in which the [Board] may truncate its inquiry into employer motivation."); *NLRB v. Brown Food Store*, 380 U.S. 278, 288 (1965) ("[T]he Board must find from evidence independent of the mere conduct involved that the conduct was primarily motivated by an antiunion animus."). In the Board's view, the Company's undisputed and stipulated good faith throughout the course of bargaining, the absence of discrimination based on union membership, and other affirmative good faith actions foreclosed any such finding. App., *infra*, 35a (quoting *Brown Food Store*, 380 U.S. at 290 ("[N]ot only is there absent in the record any independent evidence of improper motive, but the record contains positive evidence of [the Company's] good faith.")).

D. The Court of Appeals' Reversal of the Board

The court of appeals reversed the Board and held that the retention of crossovers during a lockout, absent "extreme business exigencies," violates Sections 8(a)(1) and 8(a)(3) of the Act. App., *infra*, 11a-12a. The Seventh Circuit reasoned that the retention of crossovers interferes with the right to strike as protected by Section 7. *See id.*

The court of appeals reached this result by reviewing a series of dated Board cases upholding partial lockouts implemented for "defensive" purposes as opposed to the "offensive" purpose of exerting bargaining pressure. App., *infra*, 10a-12a. The court of appeals concluded that the Company's lockout of strikers and/or retention of crossovers was not based on "defensive" objectives. App., *infra*, 12a. Failing to reconcile the Company's "offensive" desire to exert bargaining pressure with any "defensive" purpose, the Seventh Circuit concluded that an employer does not have a "legitimate and substantial" business interest in the retention of its own regular employees. App., *infra*, 8a, 12a-13a. The court of appeals then announced that crossovers may not be retained during a lockout absent "extreme business exigencies." App., *infra*, 11a-13a.

The Seventh Circuit further considered whether there is "any direct correlation between employees' non-participation in a strike and lack of support for [a union's bargaining] demands." App., *infra*, 14a. Finding none, the court of appeals rejected what it characterized as the admittedly "not . . . unreasonable" conclusion that "employees who cross a picket line have abandoned the Union's position." App., *infra*, 16a. The court of appeals further reasoned that, even if such a correlation existed, an employer could not discriminate between crossovers and strikers. App, *infra*, 16a.

Despite the Company's undisputed and stipulated good faith throughout the bargaining process, the court of appeals concluded that the Company exhibited unlawful antiunion animus. App., *infra*, 19a. The court of appeals reasoned that the "only distinction" between a crossover and a full-time striker is the extent of their participation in strike activity.

In response to the Board's argument that strikers could have ended the lockout at any time by simply agreeing to the Company's lawful contract demands, the Seventh Circuit declined to "permit inappropriate deference to employers' intent" which would validate a lockout "no matter what the terms" of an employer's offer. App., *infra*, 20a; *cf. Am. Ship*, 380 U.S. at 317 (Board holds no "general authority" to "deny weapons to one party or the other because of its assessment of that party's bargaining power.").

E. The Court of Appeals' Remedy

The Seventh Circuit concluded its opinion by instructing the Board to "consider whether [the lockout] coerced the Union and its members into ratifying [the Company's] contract offer, thereby voiding the collective bargaining agreement." App., *infra*, 21a. *Cf. Am. Ship*, 380 U.S. at 309 ("The lockout may well dissuade employees from adhering to the position which they initially adopted in bargaining. . . ."). Contrary to the court of appeals' statement, the harm claimed by the Union is not and cannot be the coercive effects of the lockout itself. *See id.* at 309, 312. Instead, for remedy purposes, the issue is whether the retention of crossovers made the lockout's coercive economic effects any more or less forceful.

REASONS FOR GRANTING THE PETITION

1. The Court of Appeals' Decision Undermines this Court's Decision in *Trans World Airlines v. Indep. Fed'n of Flight Attendants*.

The concept of unlawful discrimination articulated by the court of appeals is at odds with this Court's treatment of crossovers in *Trans World*, 489 U.S. at 426 (applying analogous statutory language under the Railway Labor Act

to crossovers). An employer may lawfully counteract strike and other "protected" activity through the use of a lockout or other economic means. *See Lodge 76 Int'l Assoc. of Machinists & Aerospace Workers v. Wisconsin Emp. Relations Comm'n*, 427 U.S. 132, 152-53 (1976); *Local 702, Int'l Bhd. of Elec. Workers v. NLRB*, 215 F.3d 11, 18 (D.C. Cir. 2000); *see also Am. Ship*, 380 U.S. at 309 ("[T]he right to bargain collectively does not entail any 'right' to insist on one's position free from economic disadvantage."). The Board reasonably concluded that the Company was not required, given the lawful counteracting purpose of the lockout, to visit the lockout's consequences on crossover employees who had abandoned Union economic action. App., *infra*, 33a. In reaching the contrary conclusion, the court of appeals violates *Trans World's* dictates and erodes an employee's Section 7 right to refrain from concerted activity.

The court of appeals concludes that the Company's lockout "selectively" punished strikers through the retention of crossovers. App., *infra*., 17a, 19a-20a. In *Trans World*, this Court explicitly rejected the same reasoning employed by the court of appeals. 489 U.S. at 438-39. The *Trans World* employer allowed crossovers to claim desirable assignments while a strike continued. This decision had long-term consequences for full-time strikers who, even after the strike's conclusion, were not permitted to reassume positions claimed by crossovers during the strike. *Id.* at 436. Significantly, the Company's actions in this case lack any long-term effects since both the duration and impact of the lockout were limited to resolving the parties' contract dispute. App., *infra*, 30a.

In *Trans World*, this Court rejected the notion that an employer's differentiation between crossovers and strikers constitutes unlawful discrimination. Like the court of appeals in this case, the *Trans World* dissent contended that allowing

crossovers to retain positions claimed during a strike "single[s] out for penalty precisely those employees who were faithful to the strike until the end, in order to benefit those who abandoned it." 489 U.S. at 447 (Brennan, J., dissenting). This Court disagreed and refused to "penaliz[e] those who decided not to strike in order to benefit those who did." *Id.* at 438. For this reason, this Court held that the *Trans World* employer was not required to displace crossovers from their positions at the strike's conclusion. *Id.*

As the Board properly recognized in this case, the legal effect of the court of appeals' decision violates *Trans World* by "visit[ing] on the crossover and nonstriking employees the consequences of the gamble taken by the employees who elected to remain on strike, by placing them in a worse position than they would have been in if the strike had not ended." App., *infra*, 33a. One "gamble" inherent in any labor dispute is that neither a union nor an employer wields exclusive control over the timing and duration of economic action. *See Am. Ship*, 380 U.S. at 310 ("[T]here is nothing in the statute which would imply that the right to strike 'carries with it' the right exclusively to determine the timing and duration of all work stoppages."). The Board reasonably concluded that crossovers need not be included in a lockout that merely continues an "economic battle" started by a union and strikers—a battle that crossovers refrained from in the first instance. App., *infra*, 36a-37a.

The court of appeals' decision requires an employer, absent extreme circumstances, to include crossovers in an otherwise lawful lockout lest it violate the Act. This result directly conflicts with *Trans World's* admonitions regarding the competing rights of strikers and crossovers:

> We see no reason why those employees who chose not to gamble on the success of the strike should

> suffer the consequences when the gamble proves unsuccessful. Requiring junior crossovers, who cannot themselves displace the newly hired permanent replacements . . . to be displaced by more senior full-time strikers is precisely to visit the consequences of the lost gamble on those who refused to take the risk.

Trans World, 489 U.S. at 438; *accord AMI/HTI Tarzana-Encino Joint Venture, d/b/a Tarzana-Encino Reg'l Med. Ctr.*, 332 N.L.R.B. 914, 918 (2000). The consequences of employee choice should not establish an unfair labor practice by an employer.

The court of appeals also errs by applying a preference for "collective" action over an "individual" employee's Section 7 rights in a manner expressly disavowed by this Court. App., *infra*, 15a-16a ("The only distinction between [crossovers and strikers] was whether an individual worker had made his or her offer to return as part of the Union's action or individually."). The *Trans World* dissent, like the court of appeals here, contended that because "union activity, by its very nature, is group activity," crossovers and non-strikers should not enjoy a "free ride[ ]" by benefiting from a refusal to strike. 489 U.S. at 448 n.4 (Brennan, J., dissenting) (citations omitted). For this reason, the *Trans World* dissent urged that crossovers should not be permitted to retain positions claimed during a strike once full-time strikers offer to return to work. *See id.*

This Court disagreed. Because Section 7 protects both the right to engage in and refrain from protected concerted activity, the statute necessarily also protects "the benefit of [an employee's] *individual* decisions not to strike." *Trans World*, 489 U.S. at 436 (emphasis added) (citations omitted); *see also Tarzana-Encino Reg'l Med. Ctr.*, 332 N.L.R.B. at

914, (applying *Trans World's* reasoning to an economic strike and lockout under the Act). A crossover's right to refrain from concerted strike activity, in the context of economic warfare between labor and management, dictates that:

> [I]n virtually every strike situation there will be some employees who disagree with their union's decision to strike and who cannot be required to abide by that decision. It is the inevitable effect of an employer's use of the economic weapons available during a period of self-help that these differences will be exacerbated and that poststrike resentments may be created.

Trans World, 489 U.S. 436-37; *see also Pattern Makers League, AFL-CIO v. NLRB*, 724 F.2d 57, 60, (7th Cir. 1983) *aff'd*, 473 U.S. 95 (1985) (quoting *NLRB v. Granite State Joint Bhd., Textile Workers Union, Local 1029*, 409 U.S. 213, 218 (1972) (An individual employee's Section 7 rights "are not lost by a union's plea for solidarity or by its pressures for conformity and submission to its regime.")). Like the employer in *Trans World*, the Company here did nothing more than maintain the economic warfare *status quo* created by the strike. The Board correctly determined that this action did not constitute an unfair labor practice, and the court of appeals clearly erred in rejecting the Board's reasonable conclusion.

The writ should be granted to reestablish the Board's reasonable and proper application of this Court's decision in *Trans World* to lockouts under the Act.

2. The Court of Appeals' Decision Conflicts with the D.C. Circuit and Creates a Double Standard that Subjugates the Rights of Crossovers.

The Board held that the Company acted for the purpose of exerting economic pressure and, therefore, the lockout was lawful. App., *infra*, 39a. An employer acting for this purpose may "convert [an] economic strike into an economic lockout when the strikers ask[ ] for reinstatement." *Field Bridge Assoc.*, 306 N.L.R.B. 322, 334 (1992), *enforced*, 982 F.2d 845 (2nd Cir. 1993); *accord NLRB v. Ancor Concepts, Inc.*, 166 F.3d 55, 57-59 (2nd Cir. 1999).

As a secondary justification "buttressing" the Company's proper motive, the Board also noted that the retention of crossovers aided the Company in continuing operations. App., *infra*, 32a-33a. The court of appeals, focusing on the Board's secondary rationale, concludes that an employer lacks a business justification for retaining crossovers absent "extreme business exigencies." App., *infra*, 11a-12a. The Seventh Circuit's reasoning creates a conflict among the circuits and, in addition, subjugates the rights of crossovers to those of replacement employees.

The Seventh Circuit relies on a series of Board cases recognizing an employer's right to institute a partial lockout as a "defensive" measure against "extreme business exigencies." App., *infra*, 11a-12a; *see also Bali Blinds Midwest*, 292 N.L.R.B. 243, 246-47 (1989) (partial lockout to avoid customer loss and repeated strikes); *Gen. Portland, Inc.*, 283 N.L.R.B. 826, 827 (1987) (partial lockout justified as defensive safety measure); *Laclede Gas Co.*, 187 N.L.R.B. 243, 244 (1970) (partial lockout instituted for "essentially defensive purposes"). The court of appeals then concludes that the Company did not face an "extreme business exigency" or "necessity" that would justify the retention of

crossover employees. App., *infra*, 12a-13a. The court of appeals' approach ignores the Board's stated rationale in this case—specifically, that the Company acted for the lawful purpose of exerting economic pressure. App., *infra*, 30a. Moreover, the Board's earlier validation of lockouts instituted for "defensive" purposes does not, as the court of appeals suggests, brand lockouts undertaken for "offensive" purposes unlawful.

The court of appeals' reliance on a distinction between "offensive lockouts" (*i.e.*, those instituted to support bargaining demands) and "defensive lockouts" (*i.e.*, those instituted to avoid extreme business exigencies) creates a conflict in the circuits. Indeed, this distinction has been expressly disavowed by the District of Columbia Circuit:

> [U]pon examination, the distinction between 'offensive' and 'defensive' tactics is ultimately unavailing. The Supreme Court has never adopted it, even when it reviewed Board decisions couched in those terms. . . . It is also difficult, if not impossible, as an administrative matter to discern whether an employer acts 'offensively' to exercise bargaining power, or 'defensively' to deflect the exercise of bargaining power against it. The particular objectives are but branches of the same tree, united by the employer's single root purpose of securing for itself the best possible bargain. Given the inherent artificiality of trying to separate these objectives, it would be unfortunate to make substantial consequences, such as liability under the Labor Act, turn on the labels of 'offensive' or 'defensive.'

Int'l Bhd. of Boilermakers, 858 F.2d at 768 (internal citations omitted). The writ should be granted to resolve the conflict

regarding the validity of a distinction between lockouts instituted for "defensive" versus "offensive" purposes.

Furthermore, through its reliance on the disavowed "offensive/defensive" dichotomy, the Seventh Circuit creates the very same anomalies cautioned against by this Court. *See Trans World*, 489 U.S. at 434, 438 (accepting argument that it would be completely anomalous to allow full-term strikers to displace crossovers when they may not displace newly-hired replacements). Under the court of appeals' approach, an employer embroiled in a labor dispute now has a greater right to retain replacement employees than its own, actively-working, bargaining unit employees. Thus, an employer may retain temporary replacement employees without fear of whether a lockout will subsequently be characterized as "defensive" or "offensive," yet may retain its own crossover employees only if defending against "extreme business exigencies."

An employer may retain temporary replacements during a lockout so long as their retention serves a nonfrivolous purpose and meets a "threshold test" of business justification. *See Boilermakers*, 858 F.2d at 762 (use of temporary replacements during lockout is not "inherently destructive" and, therefore, employer need only meet a "threshold test of business justification" for their use); *Harter*, 280 N.L.R.B. at 600 n.9 ("substantial" business justification does not "[mean] anything more than nonfrivolous"). An employer may secure permanent replacements "at will" and, as a practical consequence, impose long-term barriers to strikers' future employment prospects. *See Belknap*, 463 U.S. at 504 n.8; *see also NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 346-47 (1938).

By contrast, under the court of appeals' reasoning, a crossover may not be retained during a lockout absent a

showing of "extreme business exigency." App., *infra*, 10a-11a. The Seventh Circuit, in fact, expresses a bald preference for the use of temporary replacement employees in a lockout situation at the expense of crossovers. App., *infra*, 12a-13a. The court of appeals' view cannot be reconciled with an employer's unquestionable business interest in its own, regular employees. *See Trans World*, 489 U.S. at 437 (Crossover employees are "doubtless more experienced and therefore more needed" than replacements.); *see also The Rights of Nonstriking Employees, The Supreme Court, 1988 Term: Leading Cases: III. Federal Statutes and Regulations,* 103 HARV. L. REV. 372, 383 (1989) (predicting that *Trans World* presages a weakening of the need for a showing of economic necessity before crossovers can be promised retention).

The writ should be granted because the court of appeals' decision subjugates an entire class of employees, and creates a conflict within the circuits.

3. The Court of Appeals Erred in Rejecting the Board's Reasonable View that an Employer Has a Legitimate Business Interest in Exerting Bargaining Pressure and Counteracting Strike Activity.

The Board's decision is rooted in the principle that an employer has a legitimate interest in both exerting bargaining pressure and responding to union economic action. App., *infra*, 30a. On this basis, the Board concluded that the retention of crossovers during a lockout, absent independent evidence of antiunion animus, does not establish "discrimination based upon the Section 7 right to continue striking." App., *infra*, 35a. The Board explained:

> [I]t does not follow that the distinction [between crossovers and full-time strikers] was an unlawful

> one. For, under *Great Dane*, 'discrimination' can be lawful if there is a legitimate and substantial justification for it. In our view, there was such a justification. That justification was to place economic pressure on the Union and the employees to accept the Respondent's bargaining position. . . . The significant point is that it was no longer necessary for the Respondent to place additional pressure upon [the crossovers] to achieve its bargaining goals, for [the crossovers] had already eschewed the strike weapon during the strike.

App., *infra*, 35a-36a (citing *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967)). Employer action that reasonably serves to bring economic pressure to bear in support of lawful bargaining positions constitutes a "legitimate and substantial business purpose." *See, e.g., Harter Equip., Inc.*, 280 N.L.R.B. at 599 (characterizing the validity of this business purpose as "unassailable").

This Court has repeatedly held that the Board's rulings are "entitled to deference from the courts" if "rational and consistent" with the Act. *See, e.g., Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 42 (1987); *see also Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843-44 (1984). The court of appeals rejects the Board's conclusion that the Company's lockout constituted a legitimate exercise of economic pressure based on two rationales, each of which unduly intrude upon the Board's authority.

First, the Seventh Circuit concludes that allowing crossovers to work during the lockout converted this otherwise lawful economic action into a "punishment" aimed at strike activity. App., *infra*, at 19a. The essence of the court's view is that the purpose behind protected activity does not

matter, only the existence of the protected activity. *See generally,* Bernard D. Meltzer, *Single-Employer & Multi-employer Lockouts Under the Taft-Hartley Act*, 24 U. CHI. L. REV. 70, 78 (1956) (premise that "any interference with protected activity or the right to strike regardless of the purpose behind such interference [constitutes] a violation of the statute . . . is plainly unacceptable."). Contrary to the court of appeals' position, an employer is well-within its rights to "counteract" strike activity through a responsive lockout. *See Lodge 76 Int'l Assoc. of Machinists & Aerospace Workers* v. *Wisconsin Emp. Relations Comm'n,* 427 U.S. at 152-53 ("[E]ven were [sic] the activity presented in the instant case 'protected' activity within the meaning of [Section] 7, economic weapons were available to counter the Union's refusal to work overtime, *e.g.*, a lockout. . . ."); *Local 702, Int'l Bhd. of Elec. Workers v. NLRB,* 215 F.3d at 18 ("[T]hat activity may be protected does not insulate it from counteraction by an employer."); *Church Homes, Inc., d/b/a Avery Heights*, 343 N.L.R.B. No. 128, slip. op. at *7 (Dec. 16, 2004) (Table) ("[E]ven assuming . . . that the [employer's] motive was to break the union's solidarity in the economic battle, such an objective is not unlawful."). Because counteracting strike activity is a legitimate objective of a lockout, the court of appeals errs in prohibiting the retention of crossovers who were not engaged in the very strike activity a lockout may properly counteract. *See Trans World*, 489 U.S. at 442 ("[W]e should hesitate to imply limitations on all but those forms of self-help that strike a fundamental blow to union or employer activity and the collective bargaining process itself.").

Given an employer's established right to counteract strike activity, the court of appeals' truncated finding of antiunion motivation does not survive scrutiny. The Seventh Circuit summarily concludes that, "[b]y acting only against those who had exercised their [S]ection 7 right to strike,

[the Company] appears to have demonstrated an anti-union animus. The *only* distinction between the two groups of employees at the time of the lockout was their participation in Union activities." App., *infra*, 19a (emphasis in original). Of course, this is not the only distinction between a crossover and a full-time striker. A crossover returns to work during a period of economic warfare and blunts the effectiveness of a union's strike weapon. *See Pattern Makers' League*, 724 F.2d at 61 ("[T]he principal reason for a rule prohibiting resignations [from union membership] during strikes is to insure [sic] that union members *do not aid the company* by returning to work.") (emphasis added), *aff'd*, 473 U.S. 95 (1985). A striker, by contrast, withholds services for the express purpose of supporting union bargaining demands.

More fundamentally, an examination of other lawful economic devices exposes the flaws in the court of appeals' view. The only distinction between an economic striker and a crossover is the extent of their participation in strike activity. Yet, an employer lawfully may permanently replace the striker but holds no such right as to the crossover. *See Mackay Radio & Telegraph Co.*, 304 U.S. at 347 (employer need not discharge replacements to make room for strikers at the conclusion of a strike). The only distinction between the crossovers and full-time strikers in *Trans World* was the duration of their strike participation, but this did not render the full-time strikers immune from economic pressure. *Trans World*, 489 U.S. at 438-39.

The key consideration, as recognized by the Board, is whether an employer acts based on the proper motive of exerting economic pressure as opposed to an unlawful antiunion animus. App., *infra*, 39a ("'[P]roper analysis' of lockouts 'demands that the simple intention to support the employer's bargaining position as to compensation and the

like be distinguished from a hostility to the process of collective bargaining which could suffice to render a lockout unlawful.'") (quoting *Am. Ship*, *supra*, at 309); *see also Metro. Edison Co. v. NLRB*, 460 U.S. 693, 700 (1983) ("Congress . . . did not intend to make unlawful all acts that might have the effect of discouraging union membership. Rather, the intention was to forbid only those acts that are motivated by an antiunion animus.") (internal citations omitted). In fact, the Seventh Circuit's flawed reasoning is exposed by its reliance on the relatively small number of crossover employees involved in this case.

> The claim that these eight [non-participants] and/or the last six crossovers, together representing less than 2% of the total bargaining unit, were so vital to the maintenance of business operations that it was necessary for Midwest to violate employees' [S]ection 7 rights stretches the bounds of credulity.

App., *infra*, 12a. Obviously, the number of crossovers supports the opposite conclusion.

Given the relatively small number of crossovers, one must conclude that the Company's primary motivation for the lockout was either: (a) prolonging a protracted work stoppage based on an unlawful desire to improperly "benefit" a handful of crossovers or (b) exerting economic pressure in support of its lawful bargaining demands. The latter is clearly the only reasonable conclusion. Indeed, if the Company acted based upon unlawful antiunion animus instead of a desire to exert economic pressure, there is no explanation for the reinstatement of all strikers once agreement was reached on a collective bargaining agreement. The court of appeals commits clear error in reaching the contrary conclusion.

The writ of certiorari should be granted to restore the proper analysis of lockouts under the Act.

4. The Writ Should Be Granted Because the Court of Appeals Lacks Statutory Authority for its Suggested Remedy.

The court of appeals concludes its decision with the following: "[W]e . . . remand to the Board with instructions to find that the partial lockout was an unfair labor practice. We also remand to the Board to consider whether this unfair labor practice coerced the Union and its members into ratifying [the Company's] contract offer, thereby voiding the collective bargaining agreement." App., *infra*, 21a. The court of appeals' statement is clearly contrary to the Act's dictates.

Section 8(d) does not permit the Board or the courts to intrude upon substantive aspects of the parties' collective bargaining relationship. *See H.K. Porter Co., Inc. v. NLRB*, 397 U.S. 99, 108 (1970) (Board has no power to impose "dues checkoff proposal" absent employer agreement.); *NLRB v. Am. Nat'l Ins. Co.*, 343 U.S. 395, 404 (1952) (The Act does not empower the Board to "either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements."). For this reason, the court of appeals' peculiar pronouncement ventures into wholly uncharted waters. Petitioner is aware of no case in which a court or the Board invalidated an entire collective bargaining agreement, let alone a collective bargaining agreement that has governed the relationship between a union and an employer for four years.

Just as significantly, the court of appeals' decision leaves numerous, difficult questions completely unanswered. Assuming the labor contract (which governed the parties'

relationship for nearly four years) is void, what, if anything, takes its place? Does the Company have a duty to arbitrate grievances given the contract's suspect validity? What is the status of wage increases, exercises of seniority rights and other actions taken prior to the Seventh Circuit's decision? Was the Union within its rights to accept, and the Company within its rights to deduct, dues payments under the now suspect contract? These questions are but a preview of the problems associated with the Seventh Circuit's decision.

At base, the court of appeals' statement underscores its fundamental misapprehension of the Board's reasoning. The issue is not whether a lockout has a coercive effect that pressures employees to accept bargaining demands. *See Am. Ship*, 380 U.S. at 309 ("The lockout may well dissuade employees from adhering to the position which they initially adopted in bargaining. . . ."). Instead, the issue is whether the retention of crossovers renders a lockout's coercive effects any more or less forceful, or carries with it an inherent implication of antiunion animus.

The writ should be granted because the remedy invited by the court of appeals conflicts with the Act's statutory dictates.

CONCLUSION

The decision of the Seventh Circuit presents direct conflicts with decisions of this Court and federal circuit courts on an issue of great importance to the business community and employees. The court of appeals' decision also unduly intrudes upon the Board's statutory authority to administer the Act's provisions. For each of the reasons stated above, the Court should grant the writ of certiorari.

Respectfully submitted,

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